



**U.S. Department of Justice**

*United States Attorney  
Eastern District of New York*

SK/EMR/PP/MED/AA  
F. #2019R00927

*271 Cadman Plaza East  
Brooklyn, New York 11201*

February 11, 2023

By ECF and Email

The Honorable Brian M. Cogan  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: United States v. Genaro Garcia Luna  
Criminal Docket No. 19-576 (BMC)

Dear Judge Cogan:

The government respectfully submits this letter in response to the defendant's request for a withdrawal instruction. The government respectfully submits that the defendant is not entitled to such a charge.

"A defendant is entitled to an instruction on an affirmative defense only if the defense has a foundation in the evidence." United States v. Zayac, 765 F.3d 112, 120 (2d Cir. 2014). The sole theory proffered by the defense on withdrawal is that the defendant left public office. See ECF No. 123-1. At trial, the defense has elicited bare testimony that at the end of the Calderon Administration, the defendant left office as required—alongside other members of the cabinet. See Trial Tr. 1222-1223 (Wayne); Trial Tr. 807 (Avila); see also Trial Tr. 1168 (Hernandez) (turnover automatic).<sup>1</sup> To be entitled to a withdrawal defense, however, a defendant must demonstrate more than "proof merely that he ceased conspiratorial activity[.]" United States v. Eppolito, 543 F.3d 25, 48-49 (2d Cir 2008). A forced resignation does not meet this standard, as a matter of law. See United States v. Berger, 224 F.3d 107, 119 (2d Cir. 2000) ("resignation ... does not, in and of itself, constitute withdrawal from a conspiracy as a matter of law."); United States v. Hoskins, 44 F.4th 140, 156 (2d Cir. 2022) (resignation does not constitute withdrawal absent some "additional affirmative action"). Therefore, the defendant is not entitled to a withdrawal instruction. See United States v. Spanier, 744 F. App'x 351, 355 (9th Cir. 2018) (upholding refusal to give a withdrawal instruction "on the grounds that there was no

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<sup>1</sup> The defendant has not elicited any evidence of an affirmative act on his part. In his motion, the defendant claims that he left Mexico; however, the evidence at trial showed otherwise. See GX 102; GX 605; Trial Tr. 1196-97 (Wayne).

factual basis for the defense” where the defendant failed to inform his co-conspirators of the withdrawal).

Respectfully submitted,

BREON PEACE  
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cc: Defense Counsel (by ECF)  
Clerk of Court (BMC) (by ECF)